Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	
	)	

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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COMMENTS OF NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") submits the following comments in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding.

NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90 percent of the nation's cable television subscribers. In addition to providing multichannel video programming services, NCTA's cable operator members also provide high-speed Internet services and are increasingly offering facilities-based voice services. NCTA's members also include more than 200 cable programming networks, as well as suppliers of equipment and services to the cable industry.

INTRODUCTION AND SUMMARY

Cable companies have invested more than $95 billion since 1996 to improve their networks. This massive investment of private risk capital allows cable operators to offer a number of new services, including voice services using both circuit-switched and IP-enabled technologies. As of the first quarter of 2005, Cablevision serves 364,000 customers with its digital voice-over-cable service, Optimum Voice, adding 92,000 subscribers in the first quarter of 2005 alone. Time Warner Cable has over 500,000 Digital Phone service subscribers, and is signing up approximately 50,000 additional subscribers per month. Comcast currently serves over 1.2 million circuit-switched telephony customers, and is on target to launch 20 IP-based Comcast Digital Voice markets by the end of this year.[1] Cox Communications currently has over 1.4 million residential voice customers, and over 140,000 business locations using a combination of circuit-switched and VoIP technologies. Smaller cable operators are also offering voice communications services to subscribers. For example, Bresnan Communications, which serves several Western states, has deployed in one rural Colorado market and plans to add three more in the state by the third quarter of 2005. Overall, analysts estimate that by year-end 2005, cable operators will be marketing VoIP services to 52 million homes, and that number will rise to more than 93 million homes by year-end 2007.[2]

As part of offering voice services, cable operators will necessarily be interconnected, directly or indirectly, with other voice providers, so that all providers' customers can communicate with each other. With many millions of voice service customers already, and subscribership expected to grow, cable operators have a vital interest in a fair and reasonable regime for intercarrier

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1 *Execs Stress Sweating the Details on VoIP*, Multichannel News, May 9, 2005, at 10.

2 Kagan World Media, Broadband Technology, Feb. 18, 2005, at 3.

compensation.[3] When the Commission adopts such rules they should be default requirements and, consequently, should not interfere with the ability of service providers to enter into mutually acceptable arrangements.

NCTA believes that the key principle underlying a fair and pro-competitive intercarrier compensation regime is to apply bill-and-keep to all voice traffic.[4] This is pro-competitive because it forces each network to pay for its own services and operations from revenues received from its own direct customers. By contrast, every time one network charges another for handling inbound or outbound traffic, the charging network is exporting its own costs onto its competitor. This is simply not sustainable as the economic basis for interconnection of intermodal facilities-based competitors such as cable, traditional telephone, and wireless. Each network should be required to recover its costs from its customers, not its competitors. Only then will each network's pricing send the proper economic signals to end users, who have to choose which network or networks to use as their source of connection to the public communications infrastructure.

Another key benefit of bill-and-keep – but one which is available in other systems as well – is that it treats all traffic the same regardless of distance or technology. There are no significant engineering or cost differences to a network

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[3] Many cable-based voice services will be provided using IP-enabled technologies. The Commission has not yet ruled on whether entities providing such services are properly classified as "carriers," and therefore the term "intercarrier," as used through the Further Notice and these comments, may not be sufficiently expansive. Nevertheless, NCTA has used the currently accepted term, "intercarrier," and we intend for that term to include VoIP services that originate from/terminate to the PSTN.

[4] Exhibit A is a summary of the principles NCTA believes the Commission should apply in resolving the questions in this proceeding.

provider for originating or terminating a minute of "local" traffic, "intraLATA toll" traffic, "interstate" traffic, "ISP-bound" traffic or "wireless" traffic. Given this, no useful purpose is served by having different prices for handling these supposedly different "types" of traffic. Instead, near-irresistible incentives for arbitrage and regulatory gamesmanship arise when large amounts of money depend on whether traffic is "really" local or "really" access or "really" toll. Even if the Commission does not implement bill-and-keep on a flash-cut basis, it should nevertheless move promptly to adopt a system in which network providers charge the same rate for the origination and termination of any traffic – local or toll, interstate or intrastate, "information services" or telecommunications.

The Commission should be skeptical of any claim that current recipients of intercarrier compensation are entitled to be "kept whole." They are not. The pertinent legal requirement is that the Commission's regulatory actions not result in earnings that are so low as to be confiscatory. There is no basis to conclude that any carrier's rate of return on investment from services under the Commission's jurisdiction are so low that revenue reductions arising from resolving intercarrier compensation will result in confiscation. Absent such a showing of confiscation, however, the Commission is not foreclosed from adopting a scheme that effectively lowers return on investment if such a course is otherwise consistent with law. Moreover, even if some carriers require additional revenues, the solution is not to allow them to continue to collect payments from their competitors; it is to relieve them of any federal constraints that prevent them from collecting the money from their own customers – not indirectly from other carrier's customers.

The one exception to this principle is the need to maintain universal service. NCTA recognizes that some small, rural carriers cannot be expected to immediately recover their full cost of service from their end users. To address this problem, small carriers certificated as eligible telecommunications carriers ("ETCs") (whether incumbents or competitors) should be permitted to charge terminating access charges. To the extent that increased recovery from end users and terminating access charges are insufficient to recover the small carriers' cost of service, such carriers should receive additional universal service support as outlined below.

More broadly, in conjunction with its reform of the current intercarrier compensation regime, the Commission must also reform the contribution mechanism of the federal universal service fund, which is pending in a separate proceeding.[5] As NCTA has argued previously, the current revenue-based scheme should be replaced with a number-based contribution mechanism without assessing cable broadband, DSL, or other high-speed Internet access services.

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[5] Federal-State Joint Board on Universal Service, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24955-57 (2002)

I. A BILL-AND-KEEP APPROACH TO INTERCARRIER COMPENSATION, IMPLEMENTED OVER A REASONABLE TRANSITION PERIOD, WOULD ADVANCE THE COMMISSION'S PUBLIC INTEREST GOALS MOST EFFECTIVELY

The Commission in its Further Notice recognizes that "as a general matter, the record confirms the need to replace the existing patchwork of intercarrier compensation rules with a unified approach."[6] According to the *Staff Analysis of Bill-and-Keep ("Staff Analysis")*, parties have generally advocated one of two types of unified regimes – a bill-and-keep regime or a unified calling party's network pays ("CPNP") regime.[7] NCTA supports a bill-and-keep approach, transitioned over an appropriate time frame. The merits of bill-and-keep are effectively described in the *Staff Analysis* and we do not repeat them here, except to note that both bill-and-keep and CPNP would eliminate the ability to arbitrage and eliminate any incentive for access avoidance.[8] Bill-and-keep also largely eliminates the need for ongoing governmental involvement in intercarrier compensation matters.

The key benefit of bill-and-keep is that it requires each network to fund its own operations from its own customers. This makes it impossible for legacy networks to slow down the growth of new, competitive networks by offloading their costs to their new rivals. At the same time, bill-and-keep creates a regime in which

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[6] FNPRM at 3.

[7] Id., Appendix C at 97.

[8] The unified structure should apply to all circuit-switched traffic originated on or terminated to the PSTN, as well as VoIP traffic terminated to the PSTN regardless of class of service provider (facilities-based or non-facilities-based, ILEC, CLEC, IXC, CMRS, on IP-enabled) or technology (wireline, cable, wireless). Application of intercarrier compensation principles to non-facilities-based VoIP providers raises unique issues not heretofore faced by the Commission in designing rules for the exchange of traffic between peer networks. These issues warrant careful

the new competitive networks will grow entirely on the basis of their ability to attract customers. In addition, bill-and-keep eliminates any possibility of arbitrage, since no carrier will win or lose any advantage by characterizing traffic as "local" or "toll" or "interstate" or "intrastate" or "telecommunications" or "information service" for regulatory purposes. Wireless traffic, VoIP traffic, circuit-switched traffic, and long distance traffic would all be treated the same under a bill-and-keep regime.

The economic attractiveness of bill-and-keep is predicated on the ideas that traffic is generally roughly in balance, and that even if it is not, the cost of terminating traffic is very low. Accordingly, bill-and-keep should apply in all but two circumstances, namely: (1) where traffic is materially and significantly out of balance (as determined by the Commission), the terminating network should be permitted but not required to charge a uniform cost-based rate to be established by the Commission;[9] and (2) non-Tier 1 rural carriers and competing eligible telecommunications carriers ("CETCs") in the same service area should be permitted to charge reasonable terminating access rates and receive additional USF support as explained below. The rate and support levels should be reviewed after three years.

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consideration to avoid disproportionate burdens on either network providers or applications-based services.

[9] The Commission should also consider whether a uniform origination charge should be permitted where LECs offer presubscription, so as to compensate the originating LEC for use of its network for the provision of retail services for which the IXC will bill the LEC's customer.

II. REFORM OF THE CURRENT SYSTEM OF INTERCARRIER COMPENSATION SHOULD BE COMPETITIVELY NEUTRAL

The Further Notice recognizes that technological advances and marketplace changes are placing growing pressure on the arrangements under which one carrier today compensates another for terminating traffic. In replacing "the existing patchwork quilt of intercarrier compensation rules with a unified approach," however, the Commission should ensure that the new regime does not unfairly favor one segment of the industry or group of participants.

For example, it would not advance the public interest if the FCC were to adopt a plan that essentially provided some carriers a guarantee that they would recover from new sources all of the revenues they currently obtain from other carriers. NCTA does not oppose allowing incumbent LECs to adjust the caps on their interstate subscriber line charges to offset reductions in access charge streams. In that circumstance, competition may force the incumbent to set its prices lower than the authorized maximum. NCTA would oppose, however, an arrangement whereby an incumbent LEC were permitted to make up the shortfall in SLC revenues through universal service support.

As a policy matter, it makes no sense to guarantee the revenues of large incumbent carriers that might be lost as a result of moving to a more pro-competitive regime for intercarrier payments. As noted above, the current system of intercarrier payments allows large carriers to offload a large fraction of their costs onto their competitors. This tends to slow down the growth of competitive technologies by burdening those new technologies for the benefit of the incumbents.

This result cannot be squared with the goal of promoting competition – particularly facilities-based competition – or the goal of promoting the deployment of advanced services.

There is certainly no legal requirement that the Commission ensure that its regulatory decisions not take away revenues from large incumbent carriers. To the contrary, the relevant legal requirement is that the Commission's decisions about regulated carriers' charges not result in a return on investment that is so low as to be confiscatory.[10] As long as the carriers' overall return on investment from services under the Commission's jurisdiction is sufficient to avoid confiscation, the affected carriers have no legal basis to complain. The fact that they would like to hold onto all of their current revenues does not remotely show that they are entitled to do so.

III. IT IS MORE APPROPRIATE FOR CARRIERS AND OTHER PROVIDERS TO FIRST SEEK TO RECOVER COSTS FROM THEIR OWN END-USERS RATHER THAN SOMEONE ELSE'S CUSTOMERS

The Commission asks whether it should rely solely on end-user charges, or whether it also should rely on universal service support mechanisms, to offset costs previously recovered through access charges.[11] As explained above, the Commission should not provide revenue guarantees or attempt to mandate revenue neutrality. To the extent that Tier 1 carriers have costs that they cannot recover under a reformed access charge regime, it is more appropriate for them to collect such costs from their own end-user customers rather than the customers of other providers.

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[10] See, e.g., Verizon Communications, Inc. v. FCC, 535 U.S. 467, 528 (2002). The Commission has substantial flexibility in the choice of a regulatory method, so long as the method selected does not contravene the "constitutional bar against confiscatory rates." Id., 535 U.S. at 528.

[11] Id. at 47.

As the Commission itself explains, the assumption that the calling party is the primary beneficiary of any given call and therefore should bear all the costs of the call is likely no longer valid.[12] Customers plainly benefit not only from making calls but also from receiving them. The corollary is that end-users can reasonably be expected to pay a greater share, if not the entire cost, of the service they purchase, including costs associated with receiving calls from other networks.

In this regard, NCTA agrees with commenters that recommend the Commission establish a new, higher SLC cap.[13] The Commission should determine an appropriate transition period and phase-in the new cap in equal increments. Any provider not subject to the cap on the SLC (such as VoIP providers) should, of course, be free to charge their end users whatever rate they see fit. The availability of competitive alternatives – from the incumbent, if no one else – provides a market constraint on the ability of any such provider to charge more than a reasonable price for the service. At the same time, in order to avoid unreasonable discrimination by an incumbent attempting to suppress competition from VoIP or other competitors, the Commission should require the large incumbents to charge all their customers in a given class (business or residence), nationwide, the same SLC. Otherwise the incumbents would have both the incentive and the ability to impose the maximum permissible SLC on residential and small business customers

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[12] Id. at 15. The Commission explains that consumers have greater control over their telecommunications services through various means including caller-ID, IP-based call screening capabilities and the Do-Not-Call Registry.

who do not have meaningful competitive alternatives in order to fund SLC waivers for customers who are subject to competition.

IV. ADDITIONAL UNIVERSAL SERVICE SUPPORT SHOULD BE TARGETED TO SERVE THE NEEDS OF CERTAIN SMALLER RURAL CARRIERS

NCTA recognizes that the high cost of serving certain rural areas – generally those served by non-Tier 1 carriers – may mean that end-users in those areas cannot be expected to bear the full cost of telephone service. In these instances, reasonable uniform termination charges and additional USF support may be necessary to offset reduced access revenues.

That said, NCTA submits that it is not possible at present to actually calculate the necessary support level. Similar to the Expanded Portland Group, we suggest that the Commission establish a benchmark national local service rate, consisting of the national average urban rate plus the maximum SLC. If an eligible carrier's local service rate is below the benchmark, then the benchmark rate would be imputed before calculating the level of "access charge revenue replacement."[14] For any particular non-Tier 1 rural carrier the respective state commission should also establish a reasonable termination rate. After these two actions are taken, a calculation could be made of the remaining revenue loss that could be offset by additional universal service support.

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[13] See, e.g., ICF Proposal at 60-63; Western Wireless Proposal at 14.

[14] See FNPRM at 23. The EPG proposes a national benchmark price level calculated as described. NCTA proposes the Commission calculate the benchmark with current data at the time of an order in this proceeding. Carriers with rates below the national benchmark could petition their respective state commissions to adjust their rates to the level of the benchmark. *See also*

V. TRANSIT TRAFFIC RATES MUST BE FAIR AND REASONABLE

The issue of transit services[15] is vitally important to competitive LECs because they rely on the incumbent LECs transit services to interconnect networks between other competitive LECs and wireless providers. Transiting is often the only economically efficient and rational way for such interconnection to occur. The Commission should therefore reject any plan that would increase transit rates for carriers, driving them to supposed "market rates." Rather, the Commission must ensure that fair and economical transit arrangements are firmly in place to develop and foster a competitive telecommunications marketplace.

CONCLUSION

For the foregoing reasons, the Commission should adopt a unified intercarrier compensation regime consistent with these principles. Along with universal service reform, this proceeding is of utmost importance in setting the stage for the stable regulatory environment that can best create sustainable facilities-based competition as envisioned in the 1996 Act.

Respectfully submitted,

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FNPRM at 25, citing support for a slightly different benchmark approach by the Alliance for Rational Intercarrier Compensation.

15 See FNPRM at 57, noting that transit service is increasingly critical to establishing indirect interconnection and is explicitly recognized and supported by the Telecommunications Act of 1996.

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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Exhibit A

NCTA INTERCARRIER COMPENSATION PRINCIPLES

RATE STRUCTURE

- The FCC should mandate a unified (equal interstate/intrastate long distance/toll, inter-/intra-MTA, local and ISP-bound) rate structure for all circuit-switched traffic originated or terminated to the PSTN as well as VoIP traffic terminated to the PSTN regardless of class of service provider (facilities-based or non-facilities-based, ILEC, CLEC, IXC, CMRS, IP-enabled) or technology (wireline, cable, wireless) .
    - "Bill-and-Keep" should be the preferred post-transition compensation scheme between all carriers and other providers, except that carriers and other providers may elect to charge a uniform cost-based rate established by the Commission where traffic exchange is materially out of balance.

    - VoIP service providers should have no obligation to afford equal access/pre-subscription to carriers or other providers.

- The reduction of current rates to the long-term unified rate should occur over an appropriate transition period with equal incremental reductions each year.

- The same rules should apply to all carriers and other providers, regardless of size or technology, except that non-Tier 1 rural carriers and competing Eligible Telecommunications Carriers (CETCs) in the same service area should be permitted to charge terminating access rates and receive additional USF support based on TELRIC costs (*see also* USF section below). The rate and support levels should be reviewed after three years.

REVENUE NEUTRALITY

- In transitioning from the existing intercarrier compensation regime to a new intercarrier compensation regime, RBOCs and other Tier 1 LECs should not be entitled to revenue neutrality. That is, reduced access revenues should not be replaced by increasing existing, or creating new, funding sources other than those paid by a carrier's end-user customers such as Subscriber Line Charges or service rates.

- Non-Tier 1 rural service providers may need some form of (transitional) funding to replace reduced access revenues, based on demonstrable access charge revenue reductions and subject to appropriate cost studies.

RATE LEVEL

- The Commission should establish a cost-based call termination rate that is uniform throughout the transition period for all call types regardless of carrier class, technology or jurisdiction (interstate or intrastate).

    - If the Commission does not have the legal authority to set intrastate rates, states should establish a call termination rate based on TELRIC costs.

- The transit traffic rate should be based on TELRIC costs. The Commission should establish a reasonable range, with the upper end of range at a rate no greater than the lowest transit traffic rate charged by the RBOCs as of the issuance date of the *FNPRM*. States should then set rates within that range based on TELRIC tandem switching costs for large ILECs operating tandem switches.

- Negotiated rates that depart from the unified scheme should be permitted.

STATE ROLE

States should retain the following roles with regard to the intercarrier compensation regime:

- Jurisdiction over (contract) dispute resolution;
- For non-Tier 1 rural carriers only, setting call termination rate based on analysis of cost studies;
- Administration of intrastate rates (to the extent adopting a unified structure retains intrastate rates, e.g., with respect to rural carriers; and
- Administration of any state USF funds, including source and use of funds.

SUBSCRIBER LINE CHARGES

- Service providers should be permitted to raise Subscriber Line Charges (SLCs), with a transition over an appropriate period. The Commission should determine a new SLC cap. A service provider must charge the maximum SLC before determining eligibility for USF funds. Any service provider may charge the SLC if desired. VoIP service providers that exchange traffic with other service providers may charge the SLC, at a rate not to exceed the cap, if they so desire.
- The SLC may not be geographically deaveraged. SLCs should be waived, or not waived, only for an entire class of customers (e.g. business, residential). No contract flexibility to waive SLCs should be permitted.
- Revenues foregone by any waiver of SLCs should be counted as if no waivers had occurred for the purpose of calculating any universal service funding associated with revenue replacement for eligible carriers.

UNIVERSAL SERVICE

- Neither cable modem service nor data/Internet services provided over broadband DSL should be subject to universal service assessment.
- Any “access charge revenue replacement” fund should be limited to non-Tier 1 ILECs and (CETCs) in those service areas that would have collected access revenues and are able to demonstrate access charge revenue losses. States may elect to provide additional USF support to Tier 1 ILECs based on cost and earnings analysis under price-cap regulations.
- A benchmark national local service rate should be established based on the national average urban rate plus the SLC. If a non-Tier 1 rural carriers local service rate is below the benchmark then the benchmark rate should be imputed before calculating the level of “access charge revenue replacement.”
- A telephone number-based contribution mechanism should be established. The service provider who serves the end user is responsible for collecting and contributing to the USF fund. A surrogate for dedicated transport telecom services (private line) is required

on a unit-per-bandwidth basis. The multi-line business USF contribution should be set at 1.5-2 times the residential per-line contribution.[1]

1 See Comments of NCTA in *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24955-57 (2002).